STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL UNION NO. 238, and COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7175, Complainants,	)	
and	)	CASE NO. 4954
CITY OF WATERLOO, IOWA, Respondent.	)	

FILED
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PUBLIC EMPLOYMENT RELATIONS BOARD

PROPOSED DECISION AND ORDER

Four separate certified employee organizations[1] filed a joint prohibited practice complaint with the Public Employment Relations Board (PERB or Board) against the City of Waterloo (the City) pursuant to section 11 of the Public Employment Relations Act (the Act), chapter 20, Code of Iowa. The complaint alleges that the City refused to bargain in good faith concerning the implementation of a smoke-free workplace policy affecting City employees who are represented for purposes of collective bargaining by the Complainants, and that such conduct constitutes a prohibited practice within the meaning of section 20.10(2)(e).[2]

Notice to the parties scheduling a hearing on the complaint in Waterloo, Iowa, was subsequently issued. At hearing Laborers Local 353 and Firefighters Local 66 sought and were granted permission to withdraw, having reached a settlement of their dispute with the

[1]Chauffeurs, Teamsters & Helpers, Local Union No. 238; Communications Workers of America, Local 7175; Laborers Local Union 353 and Iowa Association of Firefighters, Local 66.

[2]This and all subsequent statutory citations, unless otherwise indicated, are to the Code of Iowa (1993).

City. The remaining Complainants--Chauffeurs, Teamsters & Helpers, Local Union No. 238 (Teamsters) and Communications Workers of America, Local 7175 (CWA)--were represented at hearing by their counsel, Neil A. Barrick, and the City by Assistant City Attorney Sang-Ki Han. All parties were afforded full opportunity to present evidence, and all waived oral summation, instead submitting written briefs and arguments.

FINDINGS OF FACT

Teamsters and CWA are employee organizations within the meaning of section 20.3(4), each of which has been certified by PERB as the exclusive collective bargaining representative of certain employees of the City, a public employer within the meaning of section 20.3(11). At least some of the employees represented by Teamsters work in City Hall, located at 715 Mulberry Street in Waterloo, while at least some of the CWA-represented employees work at the Waterloo Public Library, located at 415 Commercial Street.

Certain facts underlying the instant complaint are not in dispute, and were made of record, for the most part, by the parties' stipulation. That stipulation, and the limited testimony which was elicited, however, provides little or no detail concerning some events or conditions which do appear to be relevant to a determination of whether a prohibited practice was committed as alleged by Complainants.

It does appear from the record, however, that by the end of 1987 the City had implemented individual policies concerning smoking at its various buildings. The policy in effect at City

Hall had become effective October 1, 1987. That policy recited the existence and recent amendment of Iowa Code ch. 98A,[3] characterized that chapter as providing that "no person may smoke in a public place or at a public meeting except in designated smoking areas", and identified specific locations within City Hall where smoking would and would not be allowed.

Although the details of the smoking policy then applicable to the library were not made of record, it is clear that the policy did designate an area or areas within the building where smoking was permitted.

On March 26, 1993, Mayor Al Manning issued a memorandum (marked "IMPORTANT--PLEASE POST") to all employees concerning the subject "Smoke-Free City Buildings and Vehicles". The memo indicated that Manning had been contacted by several City employees, and had received petitions from others, who were concerned about the negative effects of second-hand smoke on their health, and recited that studies have confirmed the health hazards created by passive smoking. The memorandum continued:

> Based on these concerns, I have decided to make city buildings and enclosed vehicles smoke free. Several other area employers--both public and private--have already done this with their facilities. Our policy shall be as follows:
>
> **Effective May 1, 1993, all city buildings and enclosed vehicles (except as noted below) shall become totally smoke-free. Any one wishing to smoke will be required to go outside their building or vehicle to do so. At this time there will not be designated**

[3]Now Iowa Code ch. 142B.

> **smoking areas outside the buildings, but those wishing to smoke shall not stand so close to building entrances as to allow smoke to enter the building when the door is opened or to force those entering the building to pass through smoke. Cigarette butts are not to be thrown on the ground; the person in charge of each building shall furnish adequate receptacles in which to deposit theses.** (Emphasis in original.)

Manning's memo also set forth certain "exceptions" to the new policy, the one relevant to the present proceeding providing that related agencies, such as the Library Board, would be asked to take action to make the buildings and vehicles under their control smoke-free.

On April 30, 1993, Manning issued another memorandum to "all departments" in which he denied a request made by unidentified employees to allow designated smoking areas in the City's buildings.

On May 1, 1993, the new smoking policy announced March 26 became effective, with the result that City Hall became an entirely smoke-free building. Although the record does not reflect when the Library Board took action to make the library smoke free, as contemplated by Manning's March 26 memo, it is apparent that such action ultimately did take place.

On May 5, 1993, Teamster business representative Rosemary Hayes wrote City Personnel Director Jim Rodemeyer concerning the smoke-free policy. Hayes indicated in her letter, as she apparently had in a telephone conversation with Rodemeyer the previous day, Teamsters' belief that the City's smoke-free policy was a health and safety matter and thus a mandatory subject of

bargaining. She requested formal bargaining between Teamsters and the City on the matter.

The City, although indicating that the smoke-free policy would remain in effect, agreed to negotiate. Joint meetings between the City and at least the four unions originally party to the complaint were held. The parties were assisted at several of these meetings by a PERB staff member, who served as mediator.

On July 22, 1993, no resolution having been reached, the instant complaint was filed by the four previously-identified employee organizations.

At a subsequent bargaining session the parties reached separate tentative agreements, two of which, when later ratified, ultimately resulted in the establishment of indoor locations where employees represented by the Firefighters and Laborers would be allowed to smoke, thus precipitating their withdrawal as parties to the complaint. Despite further meetings, no final agreements resolving the issue with the Teamsters and CWA were reached. As of the date of hearing, both City Hall and the library remained smoke-free.

The complaint filed herein alleges that "[t]he Employer refuses to bargain in good faith concerning a mandatory subject of bargaining, that being the implementation of a smoke-free workplace policy covering employees of the City of Waterloo", and that such refusal constitutes a prohibited practice within the meaning of section 20.10(2)(e). That section provides:

20.10 Prohibited practices.

. . .

> 2. It shall be a prohibited practice for a public employer or the employer's designated representative willfully to:
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> . . .
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> *e.* Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.

CONCLUSIONS OF LAW

Complainants' refusal to bargain claim is premised upon the proposition that the no smoking policy implemented by the City is mandatorily negotiable under the section 20.9 topic "health and safety matters". They argue that the City made no attempt to negotiate the policy with them prior to its implementation, and that the City in fact "initially chose to refuse or deny the Complainants' request to discuss the [policy]," adding that "[n]o attempts to bargain were initially permitted by [City]."[4] Complainants acknowledge that post-implementation bargaining took place, but note that no final resolution was reached as to them and that statutory impasse-resolution procedures were not employed. Complainants maintain that impasse procedures were required before the City could lawfully implement the policy, absent Complainants' consent to the change.

The City argues, *inter alia*, that Iowa Code ch. 142B ("Smoking Prohibitions"), when read in conjunction with section 20.7, gives a public employer the exclusive right to determine where smoking shall take place, if at all. Although it refers to the designation

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[4]Complainants' brief at 4.

of smoking areas as a permissive subject of bargaining,[5] it also maintains that chapter 142B constitutes a legal prohibition against bargaining on the issue,[6] a condition which would render the subject "illegal" rather than permissive.

I.

Both parties thus appear to view the negotiability status of the City's ban on workplace smoking as necessary to the resolution of the instant complaint. While a determination of a subject's negotiability is often crucial to the resolution of refusal to bargain complaints, such is not the case under the facts which can be gleaned from the sparse record in this matter. Even if one assumes that the City's workplace smoking ban is mandatorily negotiable in its entirety, as Complainants urge,[7] the application

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[5]City's brief at 8.

[6]Id. at 6.

[7]This assumption is made only for the purpose of analyzing whether Complainants have established the City's breach of its bargaining duty, and should not be construed as a finding or conclusion that the City's smoke-free policy is in fact mandatorily negotiable in its entirety.

Although both City of Clinton, 88 PERB 3391, and Ottumwa Education Association, 92 H.O. 4510, found employer-implemented policies which banned workplace smoking to be mandatorily negotiable, at least in part, I have severe reservations concerning the correctness of those decisions. Were it necessary for me to entertain the negotiability issue in order to resolve the instant case, I would conclude that the issue of whether smoking areas will be designated or not is a permissive, rather than mandatory or illegal subject of bargaining.

As both parties appear to recognize, sections 20.7 and 20.9 are not the only statutory provisions arguably relevant to such a negotiability determination. Iowa Code ch. 142B must be considered. As I read it, that statute, although not a model of clarity at least as to its definition of "public place," has two principal effects. First, it effectively bans smoking in all such places. Second, it allows for exceptions to the smoking ban by

of established principles concerning an employer's duty to bargain lead to the conclusion that Complainants have failed to establish the City's commission of the claimed prohibited practice.

The claim is that the City, during the term of the parties' collective agreement, breached its duty to bargain by unilaterally implementing a change in a mandatorily-negotiable subject. PERB

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permitting (but not requiring) the designation of smoking areas by the persons having custody or control of the public place, while specifically prohibiting the designation of a public place (except a bar) as a smoking area in its entirety.

The General Assembly seems to have thus laid down a general "no smoking" rule, effectively precluding parties from bargaining provisions which would allow unbridled smoking in all work areas. Were parties to include such a provision in their collective bargaining agreement, it would be ineffective in view of sections 142B.2(3) and 20.28.

Having created a basic "no smoking" condition as the starting point, the first narrow choice or decision which is then allowed is whether smoking areas will or will not be designated. Although the City argues that the statute gives it, as the party in custody or control of the premises, the exclusive right to make this choice, I would find it to be permissively negotiable because I do not view the narrow question of whether designated smoking areas will exist or not, in and of itself, to be directly related to employee health or safety in the workplace. Instead, I view that narrow issue's predominant characteristic as nothing more than the comfort or convenience of smokers. I thus would hold that public employers who maintain custody or control of public places are not required to negotiate over the narrow question of whether they will designate a smoking area or areas, although they may if they choose to do so.

Should the employer elect to designate a smoking area or areas, however, I would hold that practical considerations associated with its location, separation from employee workplaces, means of ventilation, etc. are mandatorily negotiable as "health and safety matters." While section 142B.2(3) requires existing barriers and ventilation systems to be used to minimize the admittedly-toxic effect of smoke on adjacent non-smoking areas, the statute simply does not require that smoking areas be located or constructed in such a way as to absolutely prevent employees outside the designated area from being exposed. The location and construction of designated smoking areas may thus have a very real and direct effect on the health of employees in the workplace, rendering those aspects mandatorily negotiable.

has long recognized that the extent of an employer's duty to bargain mid-term changes in mandatory subjects is dependent upon the presence or absence of collective bargaining agreement provisions concerning the subject, and has repeatedly quoted with approval the following passages from Gorman's treatise on labor law:

> First, during the life of the contract, neither party has a duty to discuss any proposed modification of any term "contained in" that contract, and the Board has held it a corollary that neither party may lawfully insist on such discussion. Thus, a midterm modification of any such "contained" term may be lawfully made only after the consent of the opposing party has been voluntarily given.
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> Second, even if not "contained in" the contract, neither party may lawfully during the contract term implement a change in wages or other working conditions unless it has first bargained with the other party, that is, has given notice of the change and an opportunity to negotiate about it to impasse. (Usually the employer will seek to make the change and the union to resist it.) In short, the duty not to make unilateral changes on mandatory bargaining subjects subsists during the contract term as well as during negotiations. (Emphasis added.)

See, e.g., Des Moines Education Association, 78 PERB 1122, *citing* Gorman, Labor Law, Unionization and Collective Bargaining (1976) at 457.

The notice required from an employer before it implements a mid-term change in a mandatory subject not "contained in" the collective agreement need not be in any particular form or delivered in any particular manner. What is required is actual

notice of the impending change. See, e.g., Ankeny Education Association, 77 PERB 817; AFSCME Local 870, 82 H.O. 1980.

As to the employer's duty to provide an "opportunity to negotiate" over the contemplated change, and the availability of statutory procedures to resolve any impasse which may result, the Board has indicated:

> In determining in any case whether an employer has violated its duty to bargain in this regard, the Board will consider that the employer has met its obligation when, in the absence of evidence of bad faith or the commission of other prohibited practices, it has given notice to the certified employee organization and, if requested, has in good faith engaged in a meaningful attempt to reach a consensus with the representative. Having fulfilled that obligation, an employer is not precluded from instituting such a change, and the procedures for impasse resolution do not apply. (Emphasis added.)

Des Moines Education Association, 75 PERB 516 (Ruling on motion to dismiss). See also Jones County, 89 H.O. 3794. The employer, having provided notice of the contemplated change, is thus not required to propose bargaining--instead, the employee organization bears the burden of requesting it.

In prohibited practice proceedings such as the instant case, the Complainant shoulders the burden of proving each element of the charge. See, e.g., Southeastern Community College Higher Education Association, 85 H.O. 2625.

II.

The record presented by the parties does not reveal whether their collective agreement contains even a general "health and safety" provision, much less a specific provision concerning

workplace smoking or the availability of designated smoking areas. In the absence of evidence establishing that terms concerning the subject are "contained in" the parties' agreement, I must proceed on the basis that such terms are not included.

As previously noted, the duty of an employer desiring a change in a mandatorily-negotiable subject not contained in the parties' agreement is to give notice of the contemplated change and an opportunity to bargain over it to the point of impasse. Complainants have not made even a *prima facie* showing that the City breached this duty.

Although neither the parties' stipulation nor the other contents of the record reveal precisely how Complainants first received notice of the contemplated change in the City's workplace smoking policy, it is clear that they did receive actual notice. Even the parties' stipulation acknowledges the existence of "the employer's notice to the parties of its intent to implement a no-smoking policy on City facilities."

Nor are the Complainants heard to complain that the actual notice of the anticipated change came so close to the new policy's announced implementation date that they were deprived of an opportunity to bargain.[8]

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[8]Although the record is insufficient to establish relevant details concerning the timing of Complainants' receipt of notice, and thus the adequacy of the opportunity to request bargaining which was in fact provided, this failure of proof cannot inure to the benefit of the parties which bear the burden of establishing the commission of a prohibited practice.

Consequently, I am forced to conclude that even if the City's smoke-free workplace policy is a mandatorily-negotiable item, the record does not establish that its subject matter is "contained in" the collective agreement or that it was implemented by the City without notice and an opportunity to bargain.[9]

Accordingly, I propose the entry of the following:

ORDER

The prohibited practice complaint filed herein by Chauffeurs, Teamsters & Helpers, Local Union No. 238, and Communications Workers of America, Local 7175, is hereby DISMISSED.

DATED at Des Moines, Iowa this 2nd day of December, 1994.

Jan V. Berry,
Administrative Law Judge

[9]While Complainants' brief asserts that the City "initially chose to refuse or deny" their request to discuss the policy, and that "no attempts to bargain were initially permitted" by the City, the record does not reveal any request for or attempt at bargaining by Complainants until after the announced implementation date of the policy had passed. While the record presented surely does not reflect the totality of the relevant circumstances, it certainly does not foreclose the possibility that the Mayor's March notice of intended change was posted for all to see as the Mayor had directed, but that the Complainants, having thus received actual notice of the anticipated change, for some reason took no action to bargain the matter until the May 1 implementation date passed. Although the City, when presented with a post-implementation request for bargaining, did engage in negotiations with the four unions (and in fact reached complete agreement with two), the City was under no legal obligation to do so. It certainly was under no mid-term obligation to engage in statutory impasse-resolution procedures with Complainants, or to rescind or suspend its legally-implemented policy, when the voluntary bargaining failed to produce a complete agreement.